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ABSTRACT

Classroom speech of public-school teachers is a messy subject with regard to the tension between various societal demands and basic rights of students, teachers, and others at school sites. The demands are not always consistent, and rights are subject to different interpretations depending on which court decision forms the underlying basis for a trial's outcome. This paper analyzes the apparent confusion surrounding this issue of controversial pedagogy. The balancing of rights is discussed with respect to court cases in which the integrity of curriculum and concerns of public interest weaken or eliminate teachers' First Amendment protections. School choice affects teacher speech in a variety of ways because policy-making is decentralized, and greater importance is placed on students' and parents' decisions about what sort of educational experiences produce best results. An analytical framework of more comprehensive scope is needed in addressing these cases involving the notion of a limited public forum. At this time, the Supreme Court has not applied public-forum analysis to a teacher classroom-speech case. It may do so, however, if presented with the appropriate case. Because relevant policies vary from school to school, each instance of classroom speech must be judged on its own merits. (RT)

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Kevin Welner

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EXAMINING THE PRESENT AND THE FUTURE OF LEGAL PROTECTIONS FOR CONTROVERSIAL TEACHING IN PUBLIC SCHOOLS

Kevin Welner[1]
University of Colorado
School of Education

This paper offers a succinct discussion of material presented at length in:
Kevin G. Welner, *Locking up the marketplace of ideas and locking out school reform: Court's imprudent treatment of controversial teaching in America's public schools*, 50 UCLA L. REV. 4 (forthcoming in April, 2003).

Because Professor Ronald Hyman is presenting a closely related paper, entitled, "Protected Classroom Speech of Public School Teachers: *Pickering* and Its Progeny," I will structure my ELA presentation to build on Ronald's work. I will also structure my presentation to build on the conference theme, "Balancing rights: Education law in a brave new world," which focuses on the tension between certain societal demands and basic rights of students, teachers, and others at school sites. My presentation will examine a messy web of such demands and rights, all arising out of the issue of controversial pedagogy.

Teachers hear some of these demands from federal and state officials (increasingly in the form of specified curricular standards) and some from more local sources, such as district and school rules and guidelines. Other demands come from parents and school site councils.

Yet these demands are not always consistent. Teachers are generally expected to stay within narrow boundaries drawn by centralized authorities, but they are also expected to engage students in critical thought using innovative teaching. Moreover, demands vary from state to state, from district to district, and (increasingly, due to theme and choice schools) from school to school. Layered on top of this complexity is an arcane body of law, drawing on a mish-mash of public forum analysis (*Hazelwood*),[2] the concept of academic freedom,[3] the requirement

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1. J.D., UCLA, 1988; Ph.D., UCLA, 1997. Assistant Professor, University of Colorado at Boulder, School of Education, and co-director of the School's *Education and the Public Interest Center* (EPIC). Dr. Welner's work on this paper was funded, in part, through the support of a post-doctoral fellowship granted by the Spencer Foundation and the National Academy of Education. However, the opinions and ideas expressed herein are solely the responsibility of the author.

2. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

3. See W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301 (1998) (tracing the evolution of substantive and procedural academic freedom in secondary public schools). See also Sterzing v. Fort Bend Independent School Dist., 376 F.Supp. 657, 662 (S.D.Tex.), *vacated for reconsideration of relief granted*, 496 F.2d 92 (5th Cir. 1972); Albaum v. Carey, 283 F.Supp. 3, 11 (E.D.N.Y. 1968):

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of notice,[4] and the *Pickering/Connick* extra-classroom, public-employee-speech line of cases.[5] Several recent court decisions have applied such precedent to in-classroom speech cases in ways that essentially eliminate constitutional protections for teachers. This presentation presents, and argues for, an alternative legal framework.

Curriculum, Public Interest, and the Missing First Amendment

In *Newton v. Slye*,[6] a teacher was prohibited from posting "banned books" pamphlets on a bulletin board outsider her classroom door. The court first noted that, pursuant to *Boring v. Buncombe County Board of Education*,[7] a teacher has no First Amendment rights to control the curriculum.[8] The court then reasoned that, if the pamphlets are not considered curriculum, *Pickering* controls and the public interest analysis is used: "First Amendment protection depends on whether the posting of the pamphlets was a matter of public concern or of

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> The considerations which militate in favor of academic freedom – our historical commitment to free speech for all, the peculiar importance of academic inquiry to the progress of society, the need that both the teacher and student operate in an atmosphere of open inquiry, feeling always free to challenge and improve established ideas – are relevant to elementary and secondary schools as well as to institutions of higher learning.

Similarly, the court in *Malverne Sch. Dist. v. Sobol*, 181 A.D.2d 371, 586 N.Y.S.2d 673 (App. Div. 3d Dept. 1992) upheld the Commissioner of Education's prevention, on grounds of academic freedom, of the discipline of a teacher who had refused to comply with the school board's directive to rescind an assignment requiring students to write on the locally controversial firing of a television sports commentator. And in *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985), the court held constitutionally protected, as an exercise of his academic freedom, a teacher's inclusion of sexual material in his life science class. But compare the court's opinion in *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991), deciding that a secondary school teacher has no right to academic freedom.

4. For a comprehensive exploration of this notice requirement, see William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 264-273 (1999). Buss proposes four possible bases for this requirement: (a) implied contractual rights, (b) the creation of a designated public forum (c) procedural due process, (d) the vagueness doctrine, and (e) substantive due process. See, e.g., *Sterzing, supra*, 376 F.Supp. at 662; *Mailloux v. Kiley*, 323 F.Supp. 1387, 1392 (D.Mass), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); *Parducci v. Rutland*, 316 F.Supp. 352, 355 (M.D.Ala. 1970).

5. *Pickering v. Bd. of Educ.*, 461 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

6. 116 F. Supp. 2d 677 (W.D.Vir. 2000).

7. 136 F.3d 364 (4th Cir. 1998).

8. 116 F. Supp. 2d at 684.

curriculum."[9] But this statement implies that the choice between these two options will determine whether the teacher may, in fact, be protected by the First Amendment. Is this really the case?

Whether the pamphlets fall within the definition of "curriculum" depends on which definition is used.[10] Curriculum can be categorizing as either "intended," "hidden," "implemented," or "attained."[11] Courts are primarily interested in the intended and the implemented curricula – the lesson plans and what actually takes place in the classroom.[12] This narrow definition might not include a posting outside the classroom door. But recent court decisions have also taken a fairly expansive view of curriculum, presumptively including such activities as newspapers[13] and plays.[14]

Thus, given the broad definitions used by courts and many curriculum specialists, the pamphlets most likely should be considered to be curriculum. But this determination makes little difference. Using the *Newton* rubric, a determination that the pamphlets are curricular means that *Hazelwood*, and not *Pickering*, provides the applicable law. Assuming, however, that *Pickering* had been applied (that is, if the pamphlets were not considered curricular), the court would then consider the *Pickering* dichotomy between private speech and speech that presents matters of public concern. Moreover, in the context of the classroom, the *Newton* court highlights a second, related, dichotomy between curriculum and private speech. Even were an instance of controversial teaching to somehow be characterized as outside the curriculum, then the chances are very high that it would fail the *Pickering* test, since it would likely also be outside the public interest. Any classroom speech becomes either unprotected curriculum (matters of public concern), or unprotected non-curriculum (private speech).

These false dichotomies squeeze out the First Amendment. Pursuant to *Hazelwood*, the First Amendment affords little oversight for curricular decisions. Pursuant to *Pickering*, the First Amendment affords little oversight for decisions to punish or squelch private speech. The dichotomies appear to leave no room for academic freedom arguments protecting instructional techniques or curriculum implementation that is too creative.

One obvious step along the path out of this trap would be to renounce use of the *Pickering* test for in-class teacher speech. Another step would be to recognize that *Hazelwood*'s discussion of curriculum is not directly

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9. 116 F. Supp. 2d at 685.

10. For a discussion of the wide variety of definitions, see Philip W. Jackson, *Conceptions of the curriculum and curriculum specialists*, in PHILIP W. JACKSON (Ed.), HANDBOOK OF RESEARCH ON CURRICULUM 3-40 (1992).

11. Jackson, *supra*, note 10.

12. See, e.g., Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718 (8th Cir. 1998).

13. *Hazelwood*, *supra*, note 2.

14. *Boring*, *supra*, note 7.

transferable from students to teachers. Finally, as discussed in greater detail in the remainder of this article, courts should engage in a meaningful, case-by-case analysis of classrooms' potential status as designated public forums.

The Impact of School Choice on Teacher Speech

This section considers one on-going educational reform that is presently having a major impact on American schooling and educational policy. The content, presuppositions and implications of this reform – school choice – highlight the need for courts to move toward a broader, more comprehensive analysis of teacher speech cases.[15] School choice is designed to distribute more power among teachers and parents.[16] The choice movement is intended to create laboratories of experimentation in school design and instruction by devolving power to parents and to those (including teachers) who take it upon themselves to design, create, and maintain choice schools.[17] Within choice governance systems, policy-making is decentralized and greater importance is placed on students' and parents' decisions about what sort of educational experiences are best for them. Teachers, too, select schools with philosophies consistent with their own. This is far from a one-size-fits-all model.

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15. For a related argument, also contextually grounded in the role and purpose of public education, see Gregory A. Clarick, *Note, Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693 (1990) (arguing that courts should allow teachers to retain broad first amendment protections in order to carry out their legitimate teaching duties).

16. *See* William Foster, *Restructuring Schools*, *in* 4 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH (6th ed.) 1108 (Marvin Alkin ed., 1992); JOHN E. CHUBB AND TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS (1990); KENNETH HOWE, UNDERSTANDING EQUAL EDUCATIONAL OPPORTUNITY (1997); Patricia Wohlstetter and Thomas Buffett, *Decentralizing Dollars Under School-Based Management: Have Policies Changed?* 6(1) EDUC. POLICY 35 (1992).

17. See AMY STUART WELLS, TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY (1993); STEPHEN D. SUGARMAN AND FRANK R. KEMERER, SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW (1999); FREDERICK M. HESS, REVOLUTION AT THE MARGINS: THE IMPACT OF COMPETITION ON URBAN SCHOOL SYSTEMS (2002). *See generally*, BRUCE FULLER AND RICHARD F. ELMORE WITH GARY ORFIELD (Editors) WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE (1996); THOMAS L. GOOD AND JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS AND CHARTERS (2000). *But see* AMERICAN FEDERATION OF TEACHERS, DO CHARTER SCHOOLS MEASURE UP? THE CHARTER SCHOOL EXPERIMENT AFTER 10 YEARS, 68-69 (2002) (concluding that "unique approaches to curriculum, teaching and classroom-based instruction rarely occur in charter schools").

Charter school legislation, for instance, is specifically designed to promote local innovation by freeing charter schools from a variety of state legislation.[18] Magnet schools came into prominence as a desegregation tool, intended to lure white students to inner city schools with innovated programs.[19] Vouchers reforms are similarly grounded in the idea of parental choice among meaningful alternatives.[20] All these choice approaches eschew the premise that schools should attempt to replicate the norm. If they are not innovative, then there remains little or no policy rationale for their existence.

Accordingly, a charter school (or a magnet or voucher school) might theoretically be designed around a "marketplace of ideas" theme. Another such school might be designed around an "indoctrination" theme. A court faced with twin teacher speech cases arising out of two such dissimilar hypothetical schools should employ a legal rubric allowing consideration of the unique school goals and school designs. Consider three common whole-school reform models, all of which were recognized by the U.S. Congress through its Comprehensive School Reform Demonstration Program.[21] On the one hand, schools may adopt E.D. Hirsch's "Core Knowledge" curriculum[22] or

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18 *See generally*, BRUCE FULLER (Editor), INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION (2000); Amy Stuart Wells, Alejandra Lopez, Janelle Scott, & Jennifer Holme, *Charter Schools as Postmodern Paradox: Rethinking Social Stratification in an Age of Deregulated School Choice*. HARV. ED. REV. *69*(2), 172 (1999).

19 See CLAIRE SMREKAR AND ELLEN B. GOLDRING, SCHOOL CHOICE IN URBAN AMERICA: MAGNET SCHOOLS AND THE PURSUIT OF EQUITY. (1999); Kimberly C. West, *A desegregation tool that backfired: Magnet schools and classroom segregation.* 103 YALE L.J. 2567 (1994).

20 See CHUBB & MOE, supra, note 16; JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION (1999); GILL, B., TIMPANE, M., ROSS, K., & BREWER, D., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS (2001).

21 The Comprehensive School Reform Demonstration program (P.L. 105-78), begun in 1998, was designed to increase the quality, and accelerate the pace, of school-wide reforms in high-poverty and low- achieving schools, especially schools receiving Title I funds. The legislation promotes the adoption of comprehensive school reforms that are based on reliable research and effective practices, and that include an emphasis on basic academics and parental involvement. The 17 programs referenced in the legislation are not exclusive; the list was intended only to provide guidance of the sort of program what would be approved for funding.

22 See E. D. HIRSCH, JR., (editor), WHAT YOUR 6TH GRADER NEEDS TO KNOW: FUNDAMENTALS OF A GOOD SIXTH-GRADE EDUCATION (1993); E. D. HIRSCH, JR., THE SCHOOLS WE NEED AND WHY WE DON'T HAVE THEM (1996); M. MARSHALL, CORE KNOWLEDGE SEQUENCE CREDITED IN TEST SCORE BOOSTS. (1996); SAM STRINGFIELD,

Robert Slavin's "Success for All" program,[23] both of which are rather highly structured. Teachers at such schools would likely be considered to have notice that certain lessons are acceptable and certain lessons are not. Other schools, however, may decide to participate in Ted Sizer's Coalition of Essential Schools, which seeks to develop students' critical thinking skills and asks teachers to play the role of coach and professional rather than merely delivering predetermined curriculum.[24]

A More Comprehensive Analytical Framework

The Supreme Court has not yet applied public forum analysis to a teacher classroom speech case. A strong possibility exists, however, that the Court would do so if presented with the appropriate case. If so, the narrow focus of such an analysis would exclude or obscure the academic freedom and marketplace of ideas concerns that the Court recognized in earlier cases.[25] Given the weaknesses inherent in this approach, some commentators have renounced the use of public forum analysis, particularly in curricular speech cases.[26] But the discussion presented below argues instead that it can and should be applied in a manner that would present finders of fact with a contextualized understanding of any given classroom. In fact, I contend that school reforms such as school choice have the potential to compel the Court to focus on such context.

As generally articulated, a designated, limited public forum is created on government property when the government so intends.[27] But classrooms are governed by a variety of edicts issued in a variety of ways by people and bodies at a variety of governmental levels. School boards, for example, have the authority to micro-manage classroom curriculum and instruction, but they normally delegate that authority to the school site.[28] This raises

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AMANDA DATNOW, & NUNNERY, J., FIRST-YEAR EVALUATION OF THE IMPLEMENTATION OF THE CORE KNOWLEDGE SEQUENCE: QUALITATIVE REPORT. (1997).

23 See ROBERT E., SLAVIN, MADDEN, N.A., DOLAN, L.J., & WASIK, B.A., EVERY CHILD, EVERY SCHOOL: SUCCESS FOR ALL (1996).

24 See THEODORE R. SIZER, HORACE'S SCHOOL: REDESIGNING THE AMERICAN HIGH SCHOOL (1991).

25 See *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 512 (1969).

26 See, e.g., Helene Bryks, Comment, *A Lesson in School Censorship*: Hazelwood v. Kuhlmeier, 55 BROOK. L. REV. 291, 304-09 (1989) (arguing that public forum analysis should not be applied to curricular speech).

27 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46(1983).

28 "School boards ... normally delegate the authority to decide matters of policy implementation to professionally trained personnel. Thus, in practice, school boards give varying degrees of discretion to principals, teachers, and librarians through explicit or implicit delegations of authority." Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 89.

issues of fairness in instances where those school boards attempt to punish teacher speech. As Professor Ingber notes, school authorities, "[h]aving developed, whether or not intentionally, a decentralized decision-making structure, ... should be judicially bound to abide by it."[29]

From a perspective that accounts for such delegations and other contextual differences between schools, the key to a public forum analysis of teacher classroom speech will be the court's findings concerning the intent of diffuse governmental authorities to open the classroom to expressive activity.[30] In *Miles v. Denver Public Schools*, for instance, the court looked at school-level intent: "There is no evidence that school authorities intended to open Miles' government class for public discourse."[31] But such intent will not always be the same. If the government (e.g., the state, the school district, the founders of a choice school, the principal, or the site-based council formed as part of a decentralization reform) had been found to have structured Miles' classroom for the teaching of critical thinking, then diverse ideas and opinions would have likely been welcomed, and the classroom would arguably have become a designated, limited public forum.

Governmental intent can also be viewed in terms of adequate notice. The organizational and political context surrounding a teacher may indeed be large and unwieldy, but it can nonetheless result in clear notice. The teacher in *Conward v. Cambridge School Commission*, for instance, should have known that a general state statute prohibiting "conduct unbecoming a teacher" encompassed his decision to give a female student an "Application for a Piece of Ass."[32] No contrary rules were set forth at other organizational layers. And the teacher in *Kirkland v. Northside Independent School District* had clear notice of the district's officially adopted reading list.[33] But these are questions of fact. If a principal tells teachers that they are free to adopt a particular book even though it is not on the official list, then a court may find that the teacher did not have adequate notice that use of a given book not on the list would result in sanctions.

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29 Ingber, *Pall of Orthodoxy*, *supra* note 28, at 90. *See also* Cary v. Board of Education, 598 F.2d 535, 543 (10th Cir. 1979); Sterzing, 376 F.Supp. at 662.

30 A determination of whether the state has created a designated public forum begins with an examination of governmental intent through an evaluation of past and present policy and practice. The next step is an analysis whether past use of the forum "has been limited by well-defined standards tied to the nature and function of the forum." Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1371 (3rd Cir. 1990). Finally, the court may investigate the "permission procedure" and permission history related to speech in the forum. *Id.*; *see also* Duran v. Nitsche, 780 F.Supp. 1048, 1053 (E.D. Penn. 1991).

31 944 F.2d at 776.

32. 171 F.3d 12, 23 (1st Cir. 1999).

33 890 F.2d 794 (5th Cir. 1989).

Alternatively, consider what happens to adequate notice if the principal tells the teacher, "Here's the district's official reading list, but pursuant to our restructuring reforms, I want you to exercise your professional discretion in deciding whether to use books not on that list." Put in terms of public forum analysis, has this principal acted as a governmental policy-maker and created a designated, limited public forum? As William Buss has pointed out, this is an odd sort of forum given that the teacher is the only one given the associated speech rights.[34] Accordingly, a notice analysis may be more apt. In contrast, public forum analysis seems fairly appropriate in a scenario whereby school authorities pursue an 'open classroom' approach throughout the school, clearly inviting a marketplace of ideas.[35] A teacher should prevail in such cases if either (a) she was acting properly within the scope of a limited public forum, or (b) she was given inadequate notice that her action would be improper. In the former circumstance, the teacher should have free speech protection; in the latter, the teacher's due process rights should provide protection.

Public school teachers unquestionably serve as vehicles for curricular delivery, but they are also people with First Amendment protections.[36] Moreover, teachers' implementation of curricula can be viewed as existing along a continuum. At one end is the *fidelity approach*, whereby teachers implement the curriculum document exactly as created. At the other end is the *mutually adaptive (or evolutionary) approach*, whereby teachers apply their professional best judgment, adapting the curriculum into meaningful practice within their particular classroom context. In fact, many curriculum documents are written for the latter group of teachers, hoping for flexibility.[37] Most teachers do much more than simply read a script. These teachers, while technically instructional tools, are not automatons. Each will necessarily deliver curriculum that is at least slightly different than that of his or her colleagues down the hall. Such differences are seen by most educational scholars as highly desirable.[38]

Consequently, each case must be judged on its own merits. While recent, more restrictive decisions recognize the expanded authority of school boards and other policy-makers to prescribe curriculum in an exacting and controlling way, this deference should be balanced against legal and policy concerns about notice, academic freedom, and the pedagogical value of free speech. These recent cases have gone too far when they allow arbitrary,

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34 Buss, supra note 4, at 253.

35 See HERBERT KOHL, THE OPEN CLASSROOM: A PRACTICAL GUIDE TO A NEW WAY OF TEACHING (1969); CHARLES SILBERMAN, CRISIS IN THE CLASSROOM (1970); ROLAND S. BARTH, OPEN EDUCATION AND THE AMERICAN SCHOOL (1972); Lydia A. H. Smith, *"Open Education" Revisited: Promise and Problems in American Educational Reform (1967-1976)*, 99(2) TEACHERS COLLEGE RECORD, 371 (Winter, 1997).

36 See, e.g., *Stachura, supra,* 763 F.2d at 215.

37 Jean A. King, *Curriculum implementation*, in MARVIN ALKIN (Ed.), 1 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH (6th Ed.) (1992), 267-273.

38 Of course, teacher discretion becomes undesirable when it is used to subvert the intent of curriculum designers or of the teachers' bosses.

ex post facto punishment of teachers' curricular decisions that had never been proscribed with adequate notice. And, perhaps more importantly, courts should not forbid school authorities from adopting policies that do just the opposite -- that free up teachers to use the classroom as a place for modeling democracy and for developing critical thinking skills. If policy-makers affirmatively create this sort of designated public forum, then courts should recognize and respect those decisions. As a policy matter and as a First Amendment matter, courts should protect the right of teachers to speak freely within the bounds set by those teachers' superiors.

This analysis points to the need for a new constitutional framework to be used by courts faced with teacher speech cases. This framework must allow courts to view classrooms as they truly are – to understand the daily struggles of teachers as they try to create a stimulating and meaningful educational experience for their students. Pursuant to the weight of educational scholarship and generally accepted national goals, today's classrooms and today's teachers should be provided with the freedom and the incentives to instill morals and interpersonal skills and to teach critical and so-called "higher order" thinking skills.[39] Further, American students should be equipped to participate fully as insightful members of a democracy.[40] The constitutional framework that courts now apply most often to these cases gives short shrift to these concerns. Instead, these courts limit themselves to a relatively meaningless analysis based on one or more of three superficial considerations: (1) the courts should not interfere with democratic decisions made by locally elected school boards; (2) teacher speech is protected only if it addresses a matter of public concern; and (3) teacher classroom speech is part of the curriculum, is therefore given little if any protection, and is subject to district regulation. The first consideration simply begs the question; we do not live in an unrestricted democracy. The judicial review process is intended precisely to prevent a tyranny of the majority. The key question presented to the courts is whether the teacher's rights have been violated. If they have, then the court is obliged to interfere with the school board's decision.

The second consideration, which is generally used alternatively with the third, is a spurious application of a rule set forth by the Court for analysis of speech taking place outside the classroom. It is difficult, if not impossible, to characterize curricular speech as inside or outside the scope of "public concern."

The third consideration is also in need of alteration. Circular reasoning, concluding without analysis that teacher speech is relatively unprotected, arises out of the presently preferred rubric – public forum analysis – but both the selection and the operation of this rubric are uncertain. The resulting court decisions have often been *ad hoc* and arbitrary.

If courts are to use public forum analysis, then the scope of that analysis should be made more comprehensive. In considering whether the classroom is a designated, limited public forum, the courts should weigh

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[39] See Karen Ngeow and Yoon-San Kong, *Learning To Learn: Preparing Teachers and Students for Problem-Based Learning*. ERIC Digest, ED457524. October, 2001.

[40] See R. Freeman Butts, *National Standards and Civic Education in the United States*. INTERNATIONAL JOURNAL OF SOCIAL EDUCATION, Vol. 7 (Winter 1993), pp. 86-94.

the role of the classroom and the role of teachers in today's society *and* in the teacher's particular school.[41] American policy makers have stressed the importance of teacher professionalism, of teaching higher-order thinking skills, of preparing students to be insightful participants in American democracy, of developing interpersonal skills, and of and instilling morals. Some schools pursue these goals very diligently. Yet these schools' teachers are unlikely to fulfill such demands if making the effort would subject them to discipline. Courts that broaden the scope of their public forum analysis to include consideration of these policy goals, when appropriate, are much more apt to conclude that the relevant set of policy makers have, indeed, intended to create a limited public forum.

This sharpened public forum approach focuses on the educational context. Notice, delegation, and limited public forums each offer potentially useful perspectives. But each must also be applied in such a way as to recognize the reality of difference at the school site level. Some schools are specifically designed to place teachers in a ministerial role, while others will only be successful if teachers exercise their own discretion. It is therefore at the site level that courts will often find the most compelling evidence of governmental expectations and notice.

Consider the example of a Missouri teacher who was fired for refusing to instruct her high school students to refrain from using "indecent" language in their writing assignments.[42] She had made a conscious pedagogical decision to resist correcting such language because she felt that her inner-city students were easily discouraged. If she substantially criticized their initial efforts at writing, she reasoned, she would get no further efforts. The National Council of Teachers of English came to her defense, pointing out that the teaching methods she used were of the type that they most highly recommend to encourage student writing.

The Eighth Circuit ignored these concerns, applying instead the *Hazelwood* "legitimate pedagogical concern" standard and doing so in a rather superficial way.[43] This court did, however, have a variety of other available options. It could have decided not to apply public forum analysis and relied instead on one of the earlier lines of cases. For example, it may have cited *Kingsville Independent School District v. Cooper*[44] for the proposition that teachers should be given wider discretion in the area of methodology than in the area of curriculum content.

Alternatively, applying the constitutional framework proposed herein, the court would consider the role of the classroom and the teacher in today's society and in the particular school in question. It would weigh the conflicting directives or types of notice that policy makers have given teachers – taking into account national and state policies as well as local policy. It would take testimony concerning any professionalization policies.

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41 See generally Lee Gordon, *Note, Achieving a Student-Teacher Dialectic in Public Secondary Schools: State Legislatures Must Promote Value-Positive Education*, 36 N.Y.L. SCH. L. REV. 397, 407-08 (1991) ("The public forum analysis bases the government's regulation of the speech in question on the nature of the forum in which the speech takes place").

42 Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718 (8th Cir. 1998).

43 147 F.3d at 724.

44 611 F.2d 1109 (5th Cir. 1980).

Assuming that the school had formed a site-based council, the court would consider policies originating therefrom. If the school had a special focus, as do most choice schools, then this focus would be considered. Then, based on a comprehensive understanding of these factors, the court would determine the marching orders given to this teacher. Was this teacher given notice that the teaching approach was forbidden? If no, then her due process rights should have prevented her termination. Alternatively, did policy makers intend to give the teacher the protections found in a designated, limited public forum. If so, then the court must determine whether the teacher acted properly within the scope of that forum.

Consider also the teacher in *Boring v. Buncumbe County Board of Education*.[45] While the school probably did not create a limited public forum, the teacher was just as probably given inadequate notice that the play was forbidden. Her complaint alleged that she notified her principal "as she did every year" of the name of the play she had chosen, and the principal "did not comment or react."[46] Pursuant to this proposed framework, the court would examine policies emanating from the principal's office. After considering the entire scope of school policy-making, the court could have reasonably decided that the policy-makers with responsibility for Ms. Boring's classroom did not intend to create of a limited public forum. But the court should not have neglected the importance of notice.[47] This proposed standard acknowledges America's decentralized system of education – rejecting the one-size-fits-all mentality predetermining all classrooms to be nonpublic forums. Of necessity, it leaves in place the judicial task of subjectively weighing criteria, but only after first requiring that the court consider the most relevant considerations.

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45 136 F.3d 364 (4th Cir. 1998).

46 *Id.*, at 375.

47 "Plaintiff's contention that she was not given notice as to what was being proscribed is, of course, without merit, the plaintiff having no First Amendment right to participate in the makeup of the curriculum" (136 F.3d at 371 n.2). Because the job action in this case was only a transfer to another school, the teacher's property rights were not impaired to the extent as a teacher who is terminated. But the *Boring* court never expressly considered such matters.

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